In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1501

FRED BRAMBLETT, PETITIONER

v.

WILLIAM R. DESOBRY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petititioner contends that the doctrines of sovereign immunity and official privilege should not have been invoked to bar his action for reinstatement and damages.

Petitioner was the manager of the Fort Knox Rod and Gun Club, a non-appropriated fund activity of the federal government. He was removed by General Desobry, Commanding General of Fort Knox, for alleged mismanagement of the Club. He appealed and was given a hearing before an "Appeals Examiner," who found the removal to be an excessive penalty and recommended that petitioner be restored to his post (Pet. App. A-13). General Desobry, upon receiving the Appeals Examiner's recommendation, convened a staff committee to review the transcript and recommend action. Subsequently, General Desobry discharged petitioner (Pet. App. A-14--A-15).

Petitioner then sued to compel disclosure of the findings of the Appeals Examiner and the report of the staff committee. The findings of the Appeals Examiner were

disclosed to petitioner, who then also sought reinstatement, back pay, and damages for the allegedly arbitrary and capricious action resulting in his discharge. The district court, treating the defendant's motion to dismiss as a motion for summary judgment, allowed both sides to submit additional material, and then granted the motion. It held that it lacked jurisdiction to hear the case because the United States had not waived its sovereign immunity to suits arising out of non-appropriated fund activities, and that General Desobry was immune from suit for damages for actions taken in his official capacity. The court of appeals affirmed (Pet. App. A).

1. Non-appropriated fund activities, such as post exchanges and the Rod and Gun Club here, "are arms of the Government deemed by it essential for the performance of governmental functions * * * and partake of whatever immunities it may have under the Constitution and federal statutes." *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485. The fact that only individuals were named as defendants does not defeat the government's defense of sovereign immunity. "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' * * * or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' " *Dugan* v. *Rank,* 372 U.S. 609, 620. See, also, *Larson* v. *Domestic and Foreign Corp.,* 337 U.S. 682; *Hawaii* v. *Gordon,* 373 U.S. 57. Moreover, government officials are personally immune from suit if they are acting within the "outer perimeter of [their] line of duty." *Barr* v. *Matteo,* 360 U.S. 564, 575. Accordingly, the court of appeals correctly affirmed the grant of summary judgment for the government.

2. Although there appears to be a conflict among the circuits as to whether the Administrative Procedure Act constitutes a waiver of sovereign immunity in certain contexts, there is no conflict on the sovereign immunity issues as they are raised by this case. This case is essentially a suit for back pay and damages, as the Fort Knox Rod and Gun Club has dissolved because of insolvency and reinstatement to the Club is no longer available as a remedy (see Amended Complaint, para. 9). No court has held that the APA constitutes a waiver of sovereign immunity in a suit for money damages. Rather, the cases which hold that the APA constitutes a waiver of sovereign immunity hold that it does so only as to cases coming within its scope. See *Kletschka* v. *Driver,* 411 F. 2d 436, 445 (C.A. 2); *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F. 2d 859, 873 (C.A.D.C.). Indeed, the Fifth Circuit has recently held, in *Warner* v. *Cox,* 487 F. 2d 1301, 1303, that a suit to review allegedly arbitrary and capricious agency action in failing to make payments allegedly due under a contract was not cognizable under the APA because the APA does not waive sovereign immunity to suits seeking money damages against the United States. The court stated (487 F. 2d at 1304-1305):

> Although some circuit courts, including this one, have seen in the APA a broad and general waiver of sovereign immunity in cases to which it applies, none has yet extended this to suits seeking money damages against the United States. See *Scanwell Laboratories, Inc.* v. *Shaffer,* 137 U.S. App. D.C. 371, 424 F. 2d 859 (1970); *Kletschka* v. *Driver,* 411 F. 2d 436 (2d Cir., 1969); *Estrada* v. *Ahrens,* 296 F. 2d 690 (5th Cir., 1961) [footnote omitted].

Had plaintiff succeeded in *Warner*, it would have obtained an injunction ordering the government to pay the amounts due under the contract; in other words, a money judgment.[1]

Moreover, the APA does not waive sovereign immunity where the "doctrine is so transcending as to require dismissal of the suit." *Washington* v. *Udall*, 417 F. 2d 1310, 1320 (C.A. 9). Certainly the same rule should apply when Congress has manifested its intention that immunity should apply, as it has here. In 1970, Congress amended the Tucker Act to allow suits on contracts made by post exchanges. 28 U.S.C. 1346(a)(2), as amended. No waiver of sovereign immunity was made for other non-appropriated fund activities. See S. Rep. No. 268, 91st Cong., 1st Sess., p. 16; *Swiff-Train* v. *United States*, 443 F. 2d 1140 (C.A. 5). The legislative history of the 1970 amendment indicates that Congress was concerned that non-appropriated fund activities, other than post exchanges, might not have sufficient assets to reimburse the United States should they be held liable. H. Rep. No. 993, 91st Cong., 1st Sess., p. 2. This legislative history, in the context of non-appropriated fund contract liability under the Tucker Act, reflects congressional reaffirmation of the principle of sovereign immunity where not specifically waived. It follows that waiver in these circumstances may not properly be inferred from the APA.

3. Finally, certiorari should be denied for the additional reason that there is no merit to petitioner's challenge to the administrative action. In an uncontradicted affidavit

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[1]Since petitioner's claim is now one for accured money damages alone, he cannot defeat the government's immunity by alleging that government officials exceeded their authority (see Pet. 12-14). Cf. *Edelman* v. *Jordan*, No. 72-1410, decided March 25, 1974. In any event, as shown *infra*, pp. 4-5, there is no basis for petitioner's challenge to the administrative action in this case.

(Exh. 4 to Defendant's Statement of Facts in Support of Motion to Dismiss) General Desobry stated that he convened a special board of officers to review the record in this case and to recommend to him appropriate action. He further stated that normally members of his staff would perform this function, but that the record was too large to permit such a procedure in this case without disrupting normal staffing. The board was thus merely performing a staff review function in aid of the dicision-making process. Cf. *Morgan* v. *United States,* 298 U.S. 468, 313 U.S. 409. Petitioner points to no other action allegedly denying him rights provided by statute or regulation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.

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